SUPREME COURT, U. S

FEB 7 19

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-983

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Petitioner,

versus

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Florida and
District Court of Appeal of Florida, First District

J. Ben Watkins, of
WATKINS, HILL & MARTS
Attorneys for Petitioner
The Title Building
P.O. Drawer 1814,
Tallahassee, Florida 32302

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	4
STATEMENT OF THE CASE	5
STAGE OF PROCEEDING WHERE FEDERAL QUESTION FIRST RAISED	8
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	16
CERTIFICATE OF SERVICE	17

CITATIONS

Cases:

Margaret Mae Cantrell, et al. v. Forest City Publishing Company, (Case No. 73-5520) Opinion filed December 18, 1974 ..... 4.8.9.10. 13.14.15.16

Catlin v. United States, 324 U.S. 229, 233 6

Gertz v. Robert Welch, Inc., (June 25, 1974. Case No. 72-617) 410 U.S. 925 ..... 4.7.9

Gibson v. Maloney, Fla.App. 1968, 214 So.2d 89 5

Gibson v. Maloney, Fla. 1970, 231 So.2d 823 ..... 2.5

Gibson v. Maloney, Fla.App. 1972, 263 So.2d 632 ..... 2.6

Gillespie v. U.S. Steel Corp., 1964, 379 U.S. 148 7

Rosenbloom v. Metromedia, 403 U.S. 29, 91 S.Ct. 1811 ..... 7.9.10.13.16

CITATIONS (Continued)

Page

OTHERS

Supreme Court Rule 19(1)(a) 3

28 U.S.C., Sec. 1257 (3) 3

9 Moore's Federal Practice, Sec. 110.08 7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No.

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Petitioner,

versus

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE
AND TELEGRAPH COMPANY, a corporation,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of
the State of Florida and
District Court of Appeal of Florida, First District

Petitioner prays a Writ of Certiorari issue to review the Judgment and Opinion of the District Court of Appeal of Florida, entered in the above-entitled cause on June 4, 1974. (App. E) This Opinion is reported in 295 So.2d 120.

Petition for Writ of Certiorari was directed to the Supreme Court of the State of Florida to review the Judgment and Opinion of the District Court of Appeal.

First District. The Supreme Court of Florida by its Order entered November 13, 1974, one justice dissenting, denied the Petition for Writ of Certiorari. (App. F)

OPINIONS BELOW

The Opinion of the District Court of Appeal, First District, entered June 4, 1974, was a per curiam opinion holding:

> "Affirmed on authority of GIBSON V. MALONEY, 231 So. 2d 823 (Fla. 1970); GIBSON V. MALONEY, 263 So. 2d 632 (Fla. App. 1972), cert. den. 410 U.S. 984." (App. E)

Petition for Writ of Certiorari was filed with the Supreme Court of Florida to review the Opinion of the District Court of Appeal, First District, and this Petition was denied by formal order of the court dated November 13, 1974. (App. F)

The Opinion of the District Court of Appeal of Florida, First District, which is relied upon by the court in its Opinion filed June 4, 1974, as the basis for the affirmance of the subsequent appeal, is reported in 263 So.2d 632.

This Opinion appears as Appendix C to this Petition for Writ of Certiorari.

Petition for Writ of Certiorari to review the Opinion of the District Court entered June 4, 1974 (App. C) was filed with the Supreme Court of Florida and denied by order entered November 7, 1972.

This order appears as Appendix A to this Petition.

A Petition for Writ of Certiorari was filed with this court and subsequently denied by your order entered March 19, 1973.

This order appears as Appendix G to this Petition and is reported at 410 U.S. 984.

JURISDICTION

The Order of the Supreme Court of Florida denying the Writ of Certiorari to be directed to the District Court of Appeal of Florida, First District, *was filed November 13, 1974.* (App. F)

The jurisdiction of this court is invoked under and pursuant to the provisions of 28 U.S.C., Sec. 1257(3) and Rule 19(1)(a), Supreme Court Rules.

The Petition is filed within 90 days from the date of the order, review of which is sought by this Petition. (App. F)

The Writ of Certiorari is to be directed to the Opinion of the District Court of Appeal of Florida, First District, filed June 4, 1974, which Opinion affirmed an order of the trial court dismissing the claim of Petitioner *on the authority of the earlier Opinion of the District Court of Appeal in the same cause reported at 263 So.2d 632, which Opinion now conflicts with the decision of this court in the cases of*

GERTZ V. ROBERT WELCH, INC.
(June 25, 1974, Case No. 72-617)
410 U.S. 925, and
MARGARET MAE CANTRELL, ET AL. V. FOREST CITY PUBLISHING COMPANY (Case No. 73-5520) Opinion filed December 18, 1974.

QUESTIONS PRESENTED

One

Does The Opinion Of The District Court Of Appeal Of Florida, First District, Affirming The Trial Court's Order Dismissing With Prejudice The Claim For Libel Filed By Petitioner Decided A Substantial Federal Question In A Manner Not In Accord With Current Decisions Of This Court?

Two

Does The Opinion Of The District Court Of Appeal Of Florida, First District, Affirming Upon The Authority Of Its Earlier Opinion In This Cause, Misapply And Reach A Result Contrary To The Decisions Of This Court In Gertz v. Robert Welch, Inc., 410 U.S. 925, And Cantrell v. Forest City Publishing Company (Case No. 73-5520) Opinion Filed December 18, 1974, And Thereby Deny Petitioner His Rights Under The First, Fourteenth And Seventh Amendments To The Constitution Of The United States?

STATEMENT OF THE CASE

Petitioner was the original Plaintiff in a libel and slander action filed in the Circuit Court of Franklin County, Florida.

A Judgment was entered after the first trial based upon a jury verdict awarding Petitioner $10,000 compensatory damages and $5,000 punitive damages. (App. C. App. 13, 14)

The District Court of Appeal of Florida, First District considered that Judgment on appeal by these Respondents and affirmed the Judgment awarding both compensatory and punitive damages. (*Gibson v. Maloney*, Fla. App. 1968, 214 So.2d 89)

The Supreme Court of Florida then granted certiorari and quashed the Opinion of the District Court of Appeal remanding the cause to that court with instructions to further remand the cause to the trial court for a new trial upon proper instructions on the law. (*Gibson v. Maloney*, Fla. 1970, 231 So.2d 823)

A second trial was held in the Circuit Court of Franklin County in January, 1971. This resulted in a mistrial when the jury was unable to agree on a verdict.

In May, 1971, a third trial was held which resulted in a verdict and judgment against both Respondents for $5,000 compensatory damages and $20,000 punitive damages against the corporate Respondent. (App. C. App. 13)

That verdict and judgment of the Circuit Court was then again appealed to the District Court of Appeal of Florida, First District, by these Respondents and that court on June 13, 1972, entered its Opinion reversing the trial court and remanding the cause to the trial court with *"directions to enter judgment in favor of the Appellants."* (*Gibson v. Maloney*, Fla.App. 1972, 263 So.2d 632) (App. C, App. 13-24)

Petitioner then sought certiorari from the Supreme Court of Florida to review the Opinion of the District Court of Appeal and certiorari was denied by Order of the Supreme Court filed November 7, 1972. (App. A, App. 1, 2)

Following the denial of certiorari by this court, the trial court entered its Final Judgment dated August 7, 1973, dismissing Petitioner's claim for libel with prejudice and assessing costs against him in the sum of $2,346.58. (App. H)

This Final Judgment was then appealed to the District Court of Appeal, First District, and that court affirmed the trial court by its Opinion, review of which is now sought. (App. E)

Writ of Certiorari was then applied for in the Supreme Court of Florida and denied by that court. (App. F)

This renders the matter a "Final Judgment" within the meaning of that term, as used by this court in consideration of matters which are subject to review by certiorari. (*Catlin v. United States*, 324 U.S. 229, 233;

Gillespie v. U.S. Steel Corp., 1964, 379 U.S. 148; 9 Moore's Federal Practice, Sec. 110.08. Pgs. 111-118)

The basis for the decision, review of which is now sought, was the District Court of Appeal of Florida's interpretation and application of the opinions of this court construing state laws of libel and slander in light of the restrictions placed upon such laws by the constitutional guarantees contained in the First, Seventh and Fourteenth Amendments to the United States Constitution.

Particularly and specifically, the District Court in its Opinion affirming upon the basis of its earlier opinion in this matter relied exclusively upon the decision of this court in

ROSENBLOOM V. METROMEDIA
403 U.S. 29, 91 S.Ct. 1811,

which opinion was receded from by this court in its subsequent opinion entered June 25, 1974 in

ELMER GERTZ V. ROBERT WELCH, INC.
410 U.S. 925.

The decision by this Court in Gertz, supra, had not been handed down at the time the District Court of Appeal affirmed the Final Judgment of the trial court by opinion entered June 4, 1974, but the Gertz opinion was available prior to the decision by the Supreme Court of Florida on the Petition for Writ of Certiorari and was the basis for seeking review by that court.

The decision in *Cantrell, supra*, which again concerns itself with actual malice albeit in an invasion of privacy action rather than libel and slander, was not decided until after the state court action in this matter was concluded.

STAGE OF PROCEEDINGS WHERE FEDERAL QUESTION FIRST RAISED

The federal question pertaining to the right of comment in the instance of allegedly "public figures" was first raised in this cause in the Answer to Amended Complaint for Libel and Slander filed in the trial court:

SIXTH DEFENSE

> "* * * The Words complained of were made without malice on the activities of the Plaintiff as a public person or official and are conditionally privileged and constitute fair comment."

The issue remained present throughout the original trial, the first appeals in this cause, and the second trial and appeals. The determinative factor in the decision now before this court was the interpretation and evaluation of what constitutes "actionable libel" and proof thereof with "convincing clarity" as set forth in the Opinions of this court interpreting the provisions of state statutes governing libel and slander in light of the guarantees of free speech and free press under the United States Constitution and Amendments thereto.

The decisive factor in the litigation was the interpretation and application of the cited decisions of this court interpreting federal constitutional rights and privileges as applied to Florida Statutes governing libel and slander. The gist of Petitioner's complaint here is the *District Court misinterpreted and misapplied decisions of this court interpreting federal constitutional provisions.*

The substantial federal question has been the issue in this cause since the original pleadings and was the determinative factor in the eventual result reached by each court which has considered the matter.

REASONS FOR GRANTING THE WRIT

The District Court of Appeal of Florida in relying upon and applying the opinions of this court in *Rosenbloom v. Metromedia, supra,* misinterpreted and misapplied the law as pronounced by this court in those decisions and reached a conclusion, contrary to that reached by this court in subsequent decisions. *Gertz, supra,* and *Cantrell, supra,* concerning the applicable provisions of the constitutional right of free speech in relation to comment upon public figures or officials.

Secondly, the District Court of Appeal improperly extended the right of comment on the actions of a "public figure" (assuming arguendo the publisher of a small weekly newspaper can be a "public figure" under the facts and circumstances shown in this Petition and Appendix) to include remarks made by a private

individual to a selected group (a Rotary Club) not for dissemination to the general public and which were in support of the business interests of the person making the statement or his corporate employer.

The Supreme Court of Florida, denying review of the District Court opinion which was predicated upon this court's decision in *Rosenbloom v. Metromedia, supra*, ignored and failed to apply the subsequent decision by this court in *Gertz v. Welch, supra*, and *Cantrell v. Forest City Publishing Co., supra*.

This results in a misapplication and misinterpretation of the current prevailing expression by this court on the federal constitutional rights to be applied in a first amendment freedom of speech issue.

Particularly would this be true when the private individual making the statements alleged to be libelous against this Petitioner made such statements to this private select group and the statements were, as pointed out in the opinion by the District Court of Appeal, "*erroneous, inaccurate, and negligently made.*" (App. C, App. 22)

The individual Respondent, Defendant below, who made the actual statements complained of and subsequently had them printed and mailed out to a select, captive audience of telephone subscribers of the corporate Defendant, of which he was the President, made statements which were admittedly erroneous, and they were made by this individual *who would by reason of his position as President of the telephone company have access to the actual facts and would be*

a person upon whose opinion the general public would necessarily rely as to truth and accuracy because of the position occupied by the Defendant and his access to the factual information which he erroneously reported.

The District Court admitted the *erroneous, inaccurate and negligent nature of these factual statements* made by this individual Respondent acting on behalf of the corporate Respondent and, *when a trial jury twice concluded such inaccurate factual statements were made with actual malice by a person who knew them to be false or should by reason of his position have such knowledge,* the District Court concluded as a matter of law the jury's findings should be disregarded.

The District Court in its Opinion said:

> "Gibson erroneously represented the statistics of telephone subscribers in Apalachicola when he stated that the number of subscribers in the Apalachicola exchange was reduced by 74 by not explaining at the same time that the telephone company had transferred those telephones from the Apalachicola exchange to the newly established telephone exchange across the bay at East Point. Thus, his statement was erroneous, inaccurate, and negligently made." (App. C, App. 22)

The statement made and circulated by this private individual acting on behalf of his corporate employer

asserted a loss of telephone subscribers in a particular exchange and then attributed this loss in direct, positive and unequivocal terms to this Petitioner and his activities as publisher of a local newspaper.

Respondent GIBSON said and subsequently had printed and mailed out to a selected audience:

> "Now, I shall take Apalachicola: Our exchange there in the year 1964 lost 74 telephones — only exchange that we have that showed any loss in telephones — and, in my opinion, this loss can be attributed largely to the local newspaper in Apalachicola and its publisher, who seems to take pleasure in berating and abusing any business interest in his community, including the larger taxpayers in his County; * * *;" (App. C, App. 15)

The statement was at all times false and this Defendant had to know this for he was the president of the telephone company. He admitted he was aware of the opening of a new exchange and the transfer of subscribers to that exchange from the Apalachicola exchange. (App. C, App. 15 & 22)

At no time has any decision of this court, including the decisions relied upon by the District Court of Appeal, ever extended to or made immune from prosecution for damages *a private individual who makes admittedly erroneous and inaccurate factual statements* where he by reason of his position as president of the company involved would have first-hand knowledge of the accurate facts and would be expected

by the general public to speak the truth, when such statements are made not in the pressure of time of public broadcasting or news reporting but in a prepared speech delivered before a selected, private group and subsequently printed and mailed out to a captive audience of telephone company subscribers who had not requested such information but would be expected to believe in its accuracy because of its source.

At the time this court denied certiorari on March 19, 1973, the prevailing law on the issue of libel was that pronounced by this court in Rosenbloom v. Metromedia, *403 U.S. 29 (1971), and that could well have been the basis for the action taken by this court.*

The matter is before the court again for review after the court has receded from the broad import of *Rosenbloom* by its decision in *Gertz v. Robert Welch, Inc.*, 410 U.S. 925 (June, 1974), and further defined "actual malice" and a jury's right to find "actual malice" in *Cantrell v. Forest City Publishing Co., supra.*

The factual situation involving the issue of "public official or public figure" in the *Gertz* decision would show by simple comparison the Petitioner in this cause could not fit into that criteria.

In *Gertz* the trial judge had directed a verdict of liability because of the failure of the publication to prove "public official or public figure" and submitted the case to the jury on the issue of damages alone. (Op. Pg. 5)

Following a jury verdict and on posttrial motions, the trial judge entered a judgment for the publication notwithstanding the jury's verdict on the basis the discussion concerned a "public issue without regard to the status of a person defamed therein." (Op. Pg. 5)

The Circuit Court of Appeals, Seventh Circuit, endorsed the District Court's conclusion that Petitioner had failed to show by clear and convincing evidence that Respondent had acted with " 'actual malice' as defined by *New York Times.*" (Op. Pg. 7-8)

The Circuit Court of Appeals then affirmed the Judgment Notwithstanding the Verdict entered by the trial court. (471 F.2d 801; 1972)

This court then reversed the Circuit Court of Appeals and ordered the case remanded for a new trial under the applicable principles of law enunciated in its opinion.

The majority opinion by Justice Powell, with Justices Stewart, Marshall, Blackmun and Reahnquist concurring, directed a new trial. *There were dissenting opinions by Justice Douglass, Justice Brenan and Justice White which would have reinstated the jury verdict and judgment based thereon in favor of the Petitioner.*

In the case now before the court for review, we have a factual situation legally similar to the situation before the court in *Cantrell, supra.*

In the instant case, *two juries have found from the testimony and evidence before them the Respondent was guilty of libel and in addition, as manifested by the award of punitive damages by the jury, guilty of actual malice in the making of such statements.*

The District Court of Appeal in its opinion which forms the basis for the affirmance now before the court for review found:

> "* * * *thus, his statement* (Appellee Gibson) *was erroneous, inaccurate and negligently made.*" (App. 22)

This is legally similar to the conclusion in the *Cantrell* decision "a jury finding that the Respondents Joseph Eszterhas and Forest City Publishing Company had published knowing or reckless falsehoods about the Cantrells." (Op. Pg. 7) and which constituted a basis for the jury verdict you reinstated in *Cantrell.*

Maloney seeks to have his jury verdict based on legally similar facts and a compatible finding by a jury reinstated. *The State Appellate Court saw fit to not only upset the jury's verdict but to remand the case with instructions to enter a Judgment for Respondent.*

Petitioner has been without his day save in the trial court and this has been rendered nugatory by the appellate court action. Petitioner is certainly entitled to relief for the publication of admittedly "*erroneous, inaccurate and negligently made*" statement by Respondent.

The recent decisions distinguishing *common law malice* and *actual malice* would mandate a reinstatement of the compensatory damage award and, at the minimum, a retrial of the punitive damage award, if indeed, not reinstatement of both damage awards.

CONCLUSION

Petitioner has thus far been without relief for indeed the appellate courts have acted upon the law as they saw it to exist at the time of the decision (*Metromedia v. Rosenbloom, supra*) when to the detriment of this Petitioner but have failed to recognize subsequent decisions by this court when they substantiate the position taken by your Petitioner. (*Gertz, supra; Cantrell, supra*)

The decision before this court concerns admittedly "erroneous, inaccurate and negligently made" statements for which a jury awarded compensatory and punitive damages but from which award Petitioner has received nothing by reason of the subsequent actions of the state appellate courts.

Petitioner respectfully requests this court issue its Writ of Certiorari and set this matter for hearing on the merits.

WATKINS, HILL & MARTS
P. O. Drawer 1814
Tallahassee, Florida 32302

CERTIFICATE OF SERVICE

I certify copy of the foregoing Petition for Writ of Certiorari was furnished Isler, Welch, Bryant, Smith & Higby, 434 Magnolia Ave., Panama City, Florida, attorneys for Respondents, this ____ day of _____, 1975.

_____

INDEX TO APPENDIX

Appendix		Page
A	Order of Supreme Court of Florida filed November 7, 1972, denying Petition for Writ of Certiorari	1a
B	Petition for Writ of Certiorari filed with Supreme Court of Florida and directed to the District Court of Appeal of Florida, First District, filed August 8, 1972	3a
C	Opinion of District Court of Appeal of Florida, First District, filed June 13, 1972, (Fla.App. 1972) 263 So.2d 632	13a
D	Order of District Court of Appeal of Florida, First District, entered July 10, 1972, denying Petition for Rehearing	27a
E	Opinion of District Court of Appeal of Florida, First District, filed June 4, 1974	28a
F	Order of Supreme Court of Florida dated November 13, 1974 denying Petition for Writ of Certiorari	29a
G	Letter from Supreme Court of United States dated March 19, 1973 denying Petition for Writ of Certiorari	30a
H	Final Judgment entered August 7, 1973, by Ben C. Willis, Circuit Judge	31a

APPENDIX A

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1972

TUESDAY, NOVEMBER 7, 1972

CASE NO. 42,677

DISTRICT COURT OF APPEAL
FIRST DISTRICT

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Petitioner,

versus

B. ROY GIBSON, JR. and
ST. JOSEPH TELEPHONE AND
TELEGRAPH COMPANY, ETC.,
Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

CARLTON, Acting Chief Justice, ADKINS, BOYD, McCAIN and DEKLE, JJ., concur

A True Copy

ATTEST:

Sid J. White
Clerk Supreme Court.

(SEAL)

/s/Dave Lang, Jr.

DAVE LANG, JR.

Chief Deputy Clerk
Supreme Court of Florida

Y

CC: Hon. Raymond E. Rhodes, Clerk
Hon. Robert L. Howell, Clerk
Hon. Ben C. Willis, Judge

Truett & Watkins
(Hon. J. Ben Watkins)
Isler, Welch, Smith, Higby &
Brown (Hon. Larry G. Smith)

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

DISTRICT COURT OF APPEAL,
FIRST DISTRICT, CASE NO. P-392

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Petitioner,

versus

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, a corporation under the laws of the State of Florida,
Respondents.

Petition for Writ of Certiorari to the District Court of Appeal of Florida, First District

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

Petitioner, JOSEPH A. MALONEY, d/b/a THE APALACHICOLA TIMES, presents this Petition for Writ of Certiorari to be directed to the District Court of Appeal of Florida, First District, and says:

1. Petitioner seeks to have reviewed that certain decision of the District Court of Appeal of Florida, First District, dated June 13, 1972, and filed in the records of that court on June 13, 1972, and recorded in

Minute Book 6 at Page 134, and Order Denying Petition for Rehearing, dated July 10, 1972, and recorded on the same day in Minute Book 6 at Page 151 of the records of that court.

2. This Petition is presented pursuant to Article V, Section 4, Florida Constitution, and Rule 4.5c(6) of the Florida Appellate Rules. Jurisdiction of this Court is based upon the grounds the decision in this cause is in direct conflict on the same point of law or reaches a different end result on the same or legally comparable set of facts as prior decisions of this Court or another District Court of Appeal of the State of Florida.

3. This Petition is accompanied by conformed copies of so much of the record of the proceeding in the court below, including the decision Petitioner now seeks to have reviewed, as is necessary to show jurisdiction in this Court and is accompanied by a Brief in support of the issue of jurisdiction of this Court to hear this Petition.

4. The following is a brief statement of the facts of this matter:

(a) Petitioner, who was Plaintiff in the Circuit Court of Franklin County and Appellee in the District Court of Appeal of Florida, First District, is the owner, publisher and editor of The Apalachicola Times, a weekly newspaper published in Franklin County, Florida.

(b) B. ROY GIBSON, JR., is and was Vice President and General Manager of the ST. JOSEPH TELE-

PHONE AND TELEGRAPH COMPANY, which is the franchised corporation authorized to furnish telephone service in an eight-county area, including Franklin County, Florida. GIBSON and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY were the original Defendants in the Circuit Court and the Appellants in the District Court of Appeal and are the Respondents in this cause.

(c) On April 29, 1965, GIBSON made an address to the Rotary Club in Port St. Joe, Florida, in which he made certain factual allegations which were alleged in the subsequent libel and slander action to have been false and to have been made with actual malice directed against this Petitioner. The address was subsequently printed and distributed by ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY as a mailout with its monthly bills to all its subscribers in eight counties, which act was likewise alleged to have been done with actual malice.

(d) The Complaint in this cause upon which the issues were submitted to the jury alleged *false statements knowingly made by* Defendant GIBSON, individually and in his capacity as the Vice President and General Manager of Defendant ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, and *that such statements were made with actual malice and intent to purposefully cause harm to this Petitioner.*

(e) The Defendants, Respondents here, filed the defenses of qualified privilege and "public figure", and the issues were submitted to the jury upon the

allegations of the Complaint as supported by the testimony and evidence and defenses interposed by these Respondents.

(f) The jury was instructed on elements of actual malice which would be required in event Petitioner, Plaintiff below, was found to be a "public figure" and also that a finding of actual malice would be required before punitive damages could be awarded this Plaintiff as claimed in his Complaint.

(g) The jury returned a verdict for both compensatory and punitive damages, assessing $5,000 in compensatory damages against the individual Defendant, GIBSON, and the corporate Defendant, ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, and $20,000 in punitive damages against the corporate Defendant only.

(h) The District Court of Appeal upon these facts reversed the Judgment entered in accordance with the Verdict of the jury upon two grounds:

(1) The trial court erred in leaving to the jury as a finding of fact the question of whether Plaintiff was a "public figure", and

(2) The finding by the jury of actual malice in false statements knowingly and willfully made did not constitute "actionable libel" and therefore the trial court was directed to enter Judgment in favor of these Respondents and against this Petitioner, the original Plaintiff.

(i) This cause was first tried in the Circuit Court of Franklin County and a Final Judgment entered April 28, 1967, in accordance with the Verdict of a jury awarding compensatory and punitive damages to Petitioner.

That Judgment was affirmed by the District Court of Appeal, First District, by opinion filed August 27, 1968, reported as

GIBSON V. MALONEY
(Fla.App. 1, 1968)
214 So.2d 89.

(j) Certiorari was granted by this Court, and the Opinion of the District Court was quashed by the Opinion of this Court filed January 28, 1970, and reported as

GIBSON V. MALONEY
(Fla.App. 1, 1970)
231 So.2d 823.

The Opinion by this Court contained the instructions that "* * * *the cause is remanded to the District Court of Appeal with instructions that this cause be further remanded for a new trial upon proper instructions.*" (Emphasis Supplied)

(k) Petition for Writ of Certiorari was addressed to the United States Supreme Court, and that court by Order entered June 8, 1970, denied the Petition for Writ of Certiorari.

(1) The cause then proceeded to trial in the Circuit Court of Franklin County, and on the third trial, after a mistrial had intervened, the Verdict and Judgment for Plaintiff which were set aside by the District Court of Appeal in their Opinion, review of which is now sought, were entered.

5. The Points Involved on Appeal as stated in the Opinion by the District Court of Appeal were as follows:

POINT ONE

WHETHER THE PRIOR OPINION BY THIS COURT ESTABLISHED AS THE "LAW OF THE CASE" APPLICABLE IN SUBSEQUENT RETRIALS THAT PLAINTIFF-PETITIONER WAS A "PUBLIC FIGURE" AS A MATTER OF LAW AND SUCH ISSUE SHOULD NOT BE SUBMITTED TO THE JURY FOR THEIR FINDING.

POINT TWO

WHETHER THE DETERMINATION BY THIS COURT IN ITS PRIOR OPINION AS REFLECTED IN ITS INSTRUCTIONS THAT THE CAUSE BE REMANDED "* * * FOR A NEW TRIAL UPON PROPER INSTRUCTIONS." BECAME THE LAW OF THE CASE AND SHOULD GOVERN SUBSEQUENT RETRIALS OF THE MATTER.

POINT THREE

WHETHER WHEN THERE ARE CONFLICTING ISSUES OF FACT THE QUESTION OF WHETHER AN INDIVIDUAL IS A "PUBLIC FIGURE" IS A QUESTION OF FACT OR IS TO BE DETERMINED BY THE TRIAL COURT AS A MATTER OF LAW.

POINT FOUR

WHEN THERE IS A FINDING OF ACTUAL MALICE AS REFLECTED BY AN AWARD OF PUNITIVE DAMAGES IS THERE SUFFICIENT PROOF OF ACTUAL MALICE TO WARRANT UPHOLDING THE VERDICT IN A LIBEL AND SLANDER ACTION, THE FACT PLAINTIFF MAY OR MAY NOT BE A "PUBLIC FIGURE" NOTWITHSTANDING?

6. The same point of law was involved in the prior ruling by this Court in this particular case and also conflicts with the decision of this Court in *State of Florida, ex rel Virgil D. Hawkins v. Board of Control*, (Fla. 1955), 83 So.2d 20, which held that in construing the Constitution of the United States state courts are bound to abide by the decisions and interpretations of that Constitution by the United States Supreme Court.

The finding by the jury in this cause that actual malice existed with the making of the false statements alleged in the Complaint, as reflected by the award of punitive damages under the instruction by the trial court, should be allowed to stand under the decisions

of the United States Supreme Court in *New York Times v. Sullivan*, (1964), 84 S.Ct. 710, et seq.; *Associated Press v. Walker*, (1967), and *Curtis Publishing Company v. Butts*, (1967), both reported in 87 S.Ct. 1975, et seq.; and *Rosenbloom v. Metromedia*, (1971), 29 L.Ed.2d 318; and the decision by the Third Circuit Court of Appeals in the case of *C. R. Grove, et al. v. Dun & Bradstreet, Inc.*, (CCA 3, 1970), 438 F.2d 433, certiorari denied United States Supreme Court June, 1971, 92 S.Ct. 204; and the Circuit Court of Appeals of the Tenth Circuit in *Kansas Electric Supply Company v. Dun & Bradstreet, Inc.*, (CCA 10, 1971), 448 F.2d 647, certiorari denied United States Supreme Court March, 1972, 92 S.Ct. 1289, which held that the *"public figure" privilege and the "New York Times Doctrine" did not apply to private subscription credit reports or other private individuals or publications which did not disseminate news for consideration by the general public*, which would be the applicable situation involving the publication which was alleged to be libelous in this instance.

The District Court's opinion likewise conflicts with this Court's opinion in *Abram v. Odham*, (Fla. 1956), 89 So.2d 334, which held the issue of "actual malice" was for determination by a jury and the trial court erred in dismissing the Complaint as a matter of law in that case.

7. The District Court of Appeal, First District, in its Opinion, review of which is now sought, is in conflict with the prior decision of this Court in the instant case and with the other decisions of this Court which hold that in interpreting the United States Constitution the

state courts shall follow prior interpretations by the United States Supreme Court and likewise decisions of this Court which hold that actual malice is a prerequisite to the award of punitive damages and upon such instructions the jury in this instance awarded punitive damages, which was a jury question as shown in the ABRAM case, supra.

8. The decision of the District Court of Appeal, First District, which Petitioner seeks to have reviewed being in direct conflict with the above-mentioned decisions of this Court and other District Courts of Appeal of Florida and because of the reasons and authorities set forth in Petitioner's Brief, it is believed this Court has jurisdiction in this cause and the Petition should be granted and Writ of Certiorari issued so this Court may review on the merits the decision of the District Court of Appeal, First District, in this cause.

WHEREFORE, Petitioner requests this Court issue its Writ of Certiorari and to review this matter on the merits and then to quash the decision and Order hereby sought to be reviewed and grant such other and further relief as shall seem right and proper to the Court.

Respectfully submitted,

J. Ben Watkins

TRUETT & WATKINS
The Title Building
Tallahassee, Florida
Attorneys for Petitioner

I hereby certify copy of the foregoing Petition for Writ of Certiorari was furnished District Court of Appeal, First District, Supreme Court Building, Tallahassee, Florida, and to Larry G. Smith, Esq., Isler, Welch, Bryant, Smith, Higby & Brown, 434 Magnolia Avenue, Panama City, Florida, by mail this 8th day of August, 1972.

J. Ben Watkins

J. BEN WATKINS

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A.D. 1972.

CASE NO. P-392

B. ROY GIBSON, JR., and
ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY,
a corporation under the laws of the State of Florida,
Appellants,

versus

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Appellee.

NOT FINAL UNTIL TIME
EXPIRES TO FILE REHEARING
PETITION AND DISPOSITION
THEREOF IF FILED.

Opinion Filed June 13, 1972.

An Appeal from the Circuit Court for Franklin County, Ben C. Willis, Judge.

Larry G. Smith of Isler, Welch, Bryant, Smith, Higby & Brown, for Appellants.

Truett & Watkins, for Appellee.

SPECTOR, Chief Judge.

Appellee's libel action against appellants has been considered by this court on an earlier occasion. Gibson v. Maloney, 214 So.2d 89.

In that case, we affirmed a libel judgment against appellants in the amount of $10,000 compensatory damages and $5,000 punitive damages. The Florida Supreme Court granted certiorari and reversed this court, holding that appellee made himself a "public figure" by virtue of his newspaper publishing activities; and, therefore, under the holdings in Abram v. Odham, 89 So.2d 334; Jacova v. Southern Radio and Television Company, 83 So.2d 34; and New York Times v. Sullivan, 376 U.S. 254, the statement that gave rise to this suit was fair comment on a public matter relating to an individual who had by choice made himself newsworthy and a part of the passing scene. See Gibson v. Maloney, 231 So.2d 823. So holding, the Supreme Court directed us to remand the cause for a new trial upon proper instruction.

Upon remand a second trial was held in January of 1971 which resulted in a mistrial when the jury was unable to agree on a verdict. In May 1971, a third trial was held which resulted in the judgment against both appellants for $5,000 compensatory damages and $20,000 punitive damages against the corporate appellant only.

The facts underlying this controversy are fully set forth in the two prior appellate decisions cited above, necessitating only a brief recitation of them in the opinion where required. Appellant Gibson is an officer of the corporate appellant. In 1965, while addressing the Port St. Joe Rotary Club, he made the following statement:

> "Now, I shall take Apalachicola: Our exchange there in the year 1964 lost 74 telephones — only exchange that we have that showed any loss in telephones — and, in my opinion, this loss can be attributed largely to the local newspaper in Apalachicola and its publisher, who seems to take pleasure in berating and abusing any business interest in his community, including the larger taxpayers in his County; and, in my opinion, frequently, in referring to the Alfred I. DuPont Estate and its various interests, not only vents his displeasure, venom, and, in some instances, outright falsehoods — this in spite of the fact that the interests of the Alfred I. DuPont Estate are one of the largest taxpayers in the County.
>
> * * *
>
> "In closing, I shall simply say that I think we in Port St. Joe, and in all of the communities where the St. Joseph Telephone & Telegraph Company furnished telephone services — with the exception of Apalachiocola — are fortunate in having newspapers, in their com-

> munities, or near them, that welcome and invite business and industry. Business and industry do not go where they are unwanted and vilified, but where they are wanted and invited."

Thereafter, Gibson had the speech printed and mailed to some 6,000 telephone subscribers of the company and appellee brought this action, alleging that he was libeled by the appellants' conduct. The trials, judgments and appellate proceedings described above ensued.

The first point raised by appellant for reversal is that the trial court erred in refusing to charge the jury that the plaintiff was, as a matter of law, a public figure and that therefore plaintiff was entitled to recover only upon proof that Gibson made the defamatory statement complained of with actual malice.

The trial court gave the following instruction to the jury on the "public figure" issue:

> "There are some different rules which are applicable when the person who seeks to recover for defamation is what is known as a public figure. The public figure is not necessarily a public official, but may be anyone whose occupation or activities cause him to stand out from the general public, or one who engages in a public enterprise or course of conduct whereby he seeks to influence public opinion. Now, a public figure

> may not recover damages for defamatory falsehood relating to his conduct in connection with the activities which have made him a public figure, unless he proves that the statement or statements were made with actual malice; that is, with the knowledge that it was false or made with a reckless disregard of whether it was false or not. If you should find from the greater weight of the evidence that Mr. Maloney was, at the time of the events which have been involved here, a public figure, as I have defined it, he may recover only if you find that any defamatory statement made, was made by the defendants with actual malice against the plaintiff."

The thrust of appellants' objection to the above instruction is that it left the question of whether the plaintiff was a public figure for the jury to decide when the Supreme Court had decided, as a matter of law, that the plaintiff was a "public figure" in its opinion in the certiorari proceedings at 231 So.2d 824. The Supreme Court made the following statements regarding the status of the plaintiff:

> "The record clearly shows that appellees acquired a small weekly newspaper in Apalachicola, Florida, and immediately started a news and editorial campaign against the Alfred I. duPont interests and its affiliates, St. Joe Paper Company and St. Joseph Telephone and Telegraph Company. Samples of the publications in the record demonstate an attempt to harass and abuse the duPont in-

> terests, apparently for the purpose of convincing the public that these interests were some sort of evil influence in the community of Apalachicola and that it would therefore not be a good place to live and do business.
>
> * * *
>
> "There can be little doubt that Maloney entered the area and established the anti-duPont editorial policy of his Apalachicola Times, for the purpose of arousing public indignation against these interests, and by virtue of that made himself a public figure engaged in a public enterprise and for the purpose, among other things, of influencing public opinion. He became a part of the passing scene and therefore subject to fair comment. . . ."

Appellants contend that the Supreme Court's ruling on the "public figure" question became the law of the case, and therefore it was error to permit that question to be decided by the jury on retrial. We agree. Under the instruction as given, the jury was not required to find that plaintiff was a public figure. Indeed, as worded, the instruction enabled the jury to find that plaintiff was not a public figure, a finding which if made would run counter to the holding of the Supreme Court.

Insofar as the public figure question is concerned, the same facts were adduced on retrial as were before the Supreme Court when it made the decision that plaintiff was a "public figure". Thus, the jury was erroneously empowered to supersede the Supreme

Court's ruling with respect to that issue. At this juncture, it is necessary to recognize that class of persons coming within the "public official" doctrine of the New York Times v. Sullivan case, supra, has been broadened not only to include "public figures" in subsequent cases but has more recently been even further broadened so as to include a private individual about whom a defamatory falsehood has been uttered in a newscast about the individual's involvement in an event of public or general interest. See Rosenbloom v. Metromedia, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296.

In light of the expanded class of persons which the United States Supreme Court has permitted to be inadvertently defamed in the absence of actual malice in the interest of the dominant policy of fostering an unfettered exchange of opinion concerning public officials, public figures and individual involvement in events of public interest, there can be no doubt that the plaintiff in the case at bar falls within the ambit of the Sullivan rule as expanded by its progeny.

Having concluded, as we do, that the plaintiff is a public figure and that the jury should have been so instructed, the criticality of the trial court's failure to do so becomes apparent. Since the instruction as worded required the jury to find actual malice as a prerequisite to liability only if it found that plaintiff was a public figure, the jury could have found that plaintiff was not a public figure and therefore could have found for plaintiff without finding that actual malice existed. When viewed in this perspective, the prejudice to appellants which resulted from the failure to give the defendant's requested instruction on the "public

figure" issue is inescapable. For this reason alone, the judgment reviewed herein must be reversed.

Further examination of the instruction as given to the jury indicates that the jury was not properly instructed as to the appropriate quantum of proof which is necessary to sustain a libel judgment in a public figure case. We hasten to add that the entire field of libel actions has recently undergone a significant change as to governing principles. Some of these changes have taken place subsequent to the trial in the case at bar. Accordingly, although we must apply new principles which have evolved during this appeal, we think it only fair to observe that in large measure the judgment now under review must be reversed by reason of changes in the law of libel occurring after the entry of the final judgment and, of course, of which the trial court was unaware.

Reviewing the instruction as given to the jury, we note the following language: "If you should find from the greater weight of the evidence that . . .". Such instruction as to the quantum of proof required is consistent with that normally utilized in a civil case. In Rosenbloom v. Metromedia at 29 L.Ed.2d 318, the court described the quantum of proof necessary to be as follows:

> ". . . none of the proofs, considered either singly or cumulatively, satisfies the constitutional standard with the convincing clarity necessary to raise a jury question whether the defamatory falsehoods were broadcast with knowledge that they were false or with

> reckless disregard of whether they were false or not."

In St. Amant v. Thompson, 390 U.S. 727, 20 L.Ed.2d 262, the court likewise held that actual malice in a libel case must be proved with "convincing clarity". In Bon Air v. Time, 426 F.2d 858, 864, (C.A. 5th, 1970), the court stated the proper burden of proof in the following terms:

> "In addition the Court placed a heavy burden of proof on plaintiffs — actual malice must be proved with 'convincing clarity'."

Clear and convincing evidence exceeds the usual standard or quantum of proof customarily invoked in civil cases usually described as a preponderance of evidence or, as did the trial court below in its instruction to the jury, by the greater weight of the evidence. Yet, it does not approach that degree of certainty understood to be inherent in the "beyond a reasonable doubt" standard used in criminal cases. See The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970).

In instructing the jury that the plaintiff herein had the burden of proving his case by the lesser standard of proof, that is, by the greater weight of the evidence, the court permitted the jury to render a verdict on an impermissible constitutional standard of proof. A further point raised by appellants contends that the sufficiency of the evidence to support a jury verdict based on actual malice in a libel action was lacking. In determining the sufficiency of the evidence, our "duty is not limited to the elaboration of constitutional principles:

we must also, in proper cases, review the evidence to make certain that those principles have been constitutionally applied". New York Times v. Sullivan, 376 U.S. 254 at 285. Commenting on the necessity of reviewing the evidence, the court in Rosenbloom v. Metromedia, supra, stated at 29 L.Ed.2d 318:

> " 'With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' (footnote omitted)
>
> "Clearly, then, this Court has an 'obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments,' and in doing so 'this Court cannot avoid making an independent constitutional judgment on the facts of the case.' Jacobellis v. Ohio, 378 U.S. 84, 190, 12 L.Ed.2d 793, 799, 84 S.Ct. 1676 (1964). The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's de novo review."

Actual malice in a libel action is more than a mere negligent error. The plaintiff must prove that the publication involved was deliberately falsified or published recklessly despite the publisher's awareness of probable falsity. Investigatory failures alone were held insufficient to satisfy this standard. New York

Times v. Sullivan, 376 U.S. at 286-288, 292; and Garrison v. Louisiana, 379 U.S. 64, 73-75, 79. Garrison emphasizes that even ill will or intent to harm are not enough. There must be showing of an intent to harm "through falsehood". (379 U.S. at 73)

An examination of the allegedly defamatory statement made by appellant Gibson at the speech before the Rotary Club in Port St. Joe can only be made in light of the publications made by appellee via his newspaper publishing facilities. Appellee's publications which were admitted in evidence amount merely to an opinion by him that the business interests by whom appellant Gibson is employed are responsible for the area's economic ills. Appellee is entitled to that opinion under the freedom of speech protected by the First Amendment. On the other hand, the statements made by appellant Gibson likewise amount to no more than his opinion that appellee's attitude toward business interests are responsible for the area's economic ills. He is entitled to hold his opinion just as much as the appellee is. Gibson's statement that appellee is anti-business is not totally without proof in this record. Indeed, at least insofar as Gibson's employer and its affiliated interests are concerned, that fact appears with convincing clarity in appellee's editorials. That appellee published inaccurate statements about the duPont interests is likewise inescapable from this record. Gibson erroneously represented the statistics of telephone subscribers in Apalachicola when he stated that the number of subscribers in the Apalachicola exchange was reduced by 74 by not explaining at the same time that the telephone company had transferred those

telephones from the Apalachicola exchange to the newly established telephone exchange across the bay at East Point. Thus, his statement was erroneous, inaccurate, and negligently made. But, its inaccuracy, etc., lies not in the representation that there was a reduction of 74 telephones in the Apalachicola exchange, because factually there was. Rather, the misrepresentation lay in what Gibson did not say, that is, that the 74 telephones were lost to Apalachicola because they were transferred to East Point. Boiled down to its essence then, if appellee was in any way libeled by appellant's references to the number of telephones lost, that libel rests upon what Gibson did not say rather than what he did say.

We cannot find, based on our independent analysis of the record, that the proofs considered either singularly or cumulatively satisfy the constitutional standard with the convincing clarity necessary to support a judgment that the defamatory statements about which appellee complained were published with knowledge that they were false or with reckless disregard of whether they were false or not. A finding of actual malice in a libel case coming within the purview of New York Times v. Sullivan and its progeny cannot rest on whether a reasonably prudent man would have published or would have investigated before publishing the statement complained of. St. Amant v. Thompson, 390 U.S. at 731. The continually evolving constitutional standards which measure one's right to comment upon matters of public interest and concern simply do not permit us to hold that what transpired during the continuing exchange of opinions of each other by the parties herein amounts to actionable libel.

Accordingly, the judgments appealed herein are reversed and the cause is demanded with directions to enter judgment in favor of the appellants.

JOHNSON, J., CONCURS. WIGGINTON, J., CONCURS IN PART, DISSENTS IN PART.

WIGGINTON, J., concurring in part, dissenting in part.

I concur in that part of the able opinion authored by Judge Spector which holds that the trial court erred in submitting to the jury the issue of whether appellee was a public figure, thereby leaving to the jury's determination whether proof of actual malice was required of appellee in order to sustain his cause of action. Because of this error, I agree that the judgment should be set aside in order that a new trial under proper instructions to the jury may be had.

I cannot agree with the concluding portion of the majority opinion which holds as a matter of law that no jury question as to whether the alleged libelous statement made by appellant was made with actual malice. The speech made by appellant Gibson unequivocally charged appellee with having printed and published outright falsehoods against the Alfred I. DuPont Estate and its various interests including appellant, St. Joseph Telephone & Telegraph Company, for the purpose of venting his venom and displeasure and berating and abusing them. A statement charging any person with having published lies against another for the purpose of berating and abus-

ing them is libelous per se from which actual malice may be implied. The act of appellant Gibson in having his speech printed and mailed to 6,000 of his telephone subscribers in the coverage area of appellee's newspaper is sufficient proof of actual malice to sustain the jury's verdict. The question of malice thus becomes one to be resolved by the jury in light of the explanation made by appellant as to his motives and intentions in making the statement and his proof of truthfulness. The proof does not establish as a matter of law that appellant's charge against appellee was true, thereby absolving appellant from liability. I therefore cannot agree that the trial court should be directed to enter judgment in favor of appellants.

APPENDIX D

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A.D. 1972

CASE NO. P-392

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE AND TELEGRAPH CO., a corporation under the laws of the State of Florida,

Appellants,

versus

JOSEPH A. MALONEY, d/b/a THE APALACHICOLA TIMES

Appellee.

ORDER

Petition for Rehearing having been considered.

IT IS ORDERED that the petition is hereby denied.

WITNESS the Honorable Sam Spector, Chief Judge, and Seal of the Court this 10th day of July, A.D. 1972.

Raymond E. Rhodes

Clerk

A True Copy
ATTEST

Raymond E. Rhodes
Clerk, First District Court of Appeal
Tallahassee, Florida

APPENDIX E

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A. D. 1974.

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Appellant,

versus Case No. U-137

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, a corporation under the laws of the State of Florida.
Appellees.

NOT FINAL UNTIL TIME
EXPIRES TO FILE REHEARING
PETITION AND DISPOSITION
THEREOF IF FILED.

Opinion filed June 4, 1974.

An Appeal from the Circuit Court for Franklin County, Ben C. Willis, Judge.

J. Ben Watkins of Watkins & Hill, for Appellant.

Charles S. Isler, Jr., and Richard Smoak of Isler, Higby & Brown, for Appellees.

PER CURIAM.

Affirmed on authority of Gibson v. Maloney, 231 So.2d 823 (Fla. 1970); Gibson v. Maloney, 263 So.2d 632 (Fla. App. 1972), cert. den. 410 U.S. 984.

RAWLS, Chief Judge; JOHNSON and SPECTOR, JJ., CONCUR.

APPENDIX F

SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1974
WEDNESDAY, NOVEMBER 13, 1974

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Petitioner,

versus Case No. 45,791

B. ROY GIBSON, JR. and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY,
Respondents.

DISTRICT COURT OF APPEAL,
FIRST DISTRICT
U-137

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ADKINS, C.J., McCAIN, DEKLE and OVERTON, JJ., concur

ERVIN, J., dissents

APPENDIX G

Letter from the Supreme Court of the United States dated March 19, 1973:

RE: MALONEY, ETC. v. GIBSON, ET AL.,
No. 72-1065.

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

APPENDIX H

IN THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR FRANKLIN COUNTY

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Plaintiff.

versus Case No. 1028

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, a corporation under the laws of the State of Florida,
Defendants.

FINAL JUDGMENT

This action was heard on Defendants' Motion for Entry of Judgment and Taxation of Costs.

Pursuant to the opinion and mandate of the District Court of Appeal, First District, dated July 11, 1972, final judgment is hereby entered in favor of Defendants, B. Roy Gibson, Jr. and St. Joseph Telephone and Telegraph Company.

IT IS ADJUDGED that Plaintiff, Joseph A. Maloney, d/b/a The Apalachicola Times, take nothing by this action and that Defendants, B. Roy Gibson, Jr. and St. Joseph Telephone and Telegraph Company, go hence

without day and recover their costs from Plaintiff in the sum of $2,346.58 for which let execution issue.

ORDERED at Tallahassee, Florida, on August 7, 1973.

/s/ BEN C. WILLIS
Ben C. Willis
Circuit Judge

LIBRARY
SUPREME COURT, U. S

FILED
MAR 7 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-983

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Petitioner,

versus

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, a corporation under the laws of Florida,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Charles S. Isler, Jr. of
ISLER, HIGBY, BROWN & SMOAK
431 Magnolia Avenue
Panama City, Florida 32401

ATTORNEYS FOR RESPONDENTS

INDEX

Page

CITATION OF AUTHORITIES i

REPORTS OF OPINIONS DELIVERED IN COURTS BELOW 2

JURISDICTION 2

STATEMENT OF THE CASE 2

QUESTIONS PRESENTED 3

SUMMARY OF ARGUMENT 3

REASONS FOR DENYING THE WRIT 5

CONCLUSION 19

CERTIFICATE OF SERVICE 20

CITATIONS OF AUTHORITIES

Cases:

Cantrell v. Forest City Publishing Co., ___ U.S. ___, 95 S.Ct. 465 (1974) 3,4,5, 13,14,15,19

Curtis Publishing Co. v. Butts. Associated Press v. Walker, 388 U.S. 130, 87 S.Ct. 1975 (1967) 6,12

Gertz v. Robert Welch, Inc., ___ U.S. ___, 94 S.Ct. 2997 (1974) 3,4,5,6,7,8,9,12,19

Gibson v. Maloney, 231 So.2d 823 (Fla. 1970) 2,5,9,16

Gibson v. Maloney, 263 So.2d 632 (1st D.C.A. Fla. 1972) 5,10,17

Maloney v. Gibson, 295 So.2d 120 (1st D.C.A. Fla. 1974) 5

CITATIONS OF AUTHORITIES (Continued)

Page

New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964) 6,7,10,15,16,17,19

Olesen v. Trust Co. of Chicago, 245 F.2d 522 (7th Cir. 1957), *cert. denied* 255 U.S. 896 (1957) 19

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811 (1971) 7,11,17

St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323 (1968) 17

Other:

Constitution of the United States
Fourteenth Amendment 4,18

Seventh Amendment 4,18

28 U.S.C. §1257(3) 2

Supreme Court Rule 19(1)(a) 2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-983

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Petitioner,

versus

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, a corporation under the laws of Florida,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents, B. Roy Gibson, Jr. and St. Joseph Telephone and Telegraph Company, file this Brief in opposition to the Petition of Joseph A. Maloney, d/b/a The Apalachicola Times, seeking a writ of certiorari to the Supreme Court of Florida and the District Court of Appeal of Florida, First District, for review of the judgment and opinion of the District Court of Appeal entered on June 4, 1974.

REPORTS OF OPINIONS DELIVERED IN COURTS BELOW

Gibson v. Maloney, 214 So.2d 89 (1st D.C.A. Fla. 1967).

Gibson v. Maloney, 231 So.2d 823 (Fla. 1970), *cert. denied*, 398 U.S. 951 (1970).

Gibson v. Maloney, 263 So.2d 632 (1st D.C.A. Fla. 1972), *cert. denied*, 410 U.S. 984 (1973).

Maloney v. Gibson, 295 So.2d 120, (1st D.C.A. Fla. 1974), *cert. denied*, ____ So.2d ____ (Fla. Nov. 13, 1974).

JURISDICTION

The Petitioner has attempted to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3) and Rule 19(1)(a), Supreme Court Rules. The Respondents submit that the decision of the District Court of Appeal of Florida clearly does not decide a federal question of substance in any way not in accord with applicable decisions of this Court. Therefore, this Court should decline jurisdiction and deny certiorari.

STATEMENT OF THE CASE

Respondents would supplement the Petitioner's Statement of the Case to include the fact that this Court denied a petition for a writ of certiorari by the Petitioner following the action by the Florida Supreme Court in *Gibson v. Maloney*, 231 So.2d 823 (Fla. 1970); this Court's order is reported at 398 U.S. 951.

QUESTIONS PRESENTED

The Respondents do not agree that the questions presented in the Petition are properly before this Court. The Respondents submit that the two questions presented by the Petitioner should be answered in the following manner:

ONE:

The opinion of the District Court of Appeal of Florida, First District, does not decide a substantial federal question in a way not in accord with the applicable current decisions of this Court.

TWO:

The opinion of the District Court of Appeal of Florida, First District, does not misinterpret and misapply the decisions of this Court in *Gertz v. Robert Welch, Inc.*, ___ U.S. ___, 94 S.Ct. 2997 (1974), and *Cantrell v. Forest City Publishing Co.*, ___U.S. ___, 95 S.Ct. 465 (1974), so as to deny Petitioner's rights under the First, Fourteenth, and Seventh Amendments of the Constitution of the United States.

SUMMARY OF ARGUMENT

I

Because all issues in the Petition have been previously presented to this Court in earlier

petitions by the Petitioner, they have been forever settled as law of this case and are no longer grounds for review.

II

This case does not conflict with *Gertz v. Robert Welch, Inc.*, ___ U.S. ___, 94 S.Ct. 2997 (1974). *Gertz* concerns only the liability for defamation of a "private individual." This case involves the privilege against liability for defamation of a "public figure."

III

This case does not conflict with *Cantrell v. Forest City Publishing Co.*, ___ U.S. ___, 95 S.Ct. 465 (1974). The state courts in this case have found no proof of "actual malice" which the Petitioner, as a public figure, must prove to recover for defamation. *Cantrell* does not alter the Court's definition of "actual malice," which has been assiduously applied by the state courts in this case.

IV

The Petitioner has not been denied his right to a jury trial under the Seventh Amendment of the Constitution of the United States because that amendment has not been incorporated into the Fourteenth Amendment to apply to the state courts.

REASONS FOR DENYING THE WRIT

The District Court of Appeal of Florida, First District, did not misinterpret or misapply the decisions of *Gertz v. Robert Welch, Inc.*, ___ U.S. ___, 94 S.Ct. 2997 (1974), and *Cantrell v. Forest City Publishing Co.*, ___ U.S. ___, 95 S.Ct. 465 (1974).

I

Because All Issues In The Petition Have Been Previously Presented To This Court In Earlier Petitions By The Petitioner, They Have Been Forever Settled As Law Of This Case And Are No Longer Grounds For Review.

Because the most recent actions by the District Court of Appeal of Florida and the Supreme Court of Florida resulted in a per curiam affirmance in favor of the Respondents and a denial of the Petitioner's petition for a writ of certiorari respectively, it is necessary to refer to the text of the earlier opinions rendered in this case by those courts in *Gibson v. Maloney*, 231 So.2d 823 (Fla. 1970), and *Gibson v. Maloney*, 263 So.2d 623 (1st D.C.A. Fla. 1972). The per curiam decision of the District Court of Appeal of Florida that is presently in issue specifically states. "Affirmed on authority of Gibson v. Maloney, 231 So.2d 823 (Fla. 1970), Gibson v. Maloney, 263 So.2d 632 (Fla. App. 1972), cert. den. 410 U.S. 984." Maloney v. Gibson 295 So.2d 120 (1st D.C.A. Fla. 1974). Both of those decisions were presented for this Court's review in the Petitioner's other petitions to this Court for a

writ of certiorari in 1970 (Case No. 69-1501; 398 U.S. 951) and in 1973 (Case No. 72-1065; 410 U.S. 984), and this Court denied certiorari in each instance. It is submitted that the only issues presented now by the Petitioner were in fact previously the subjects of review by this Court on those two occasions. Consequently, these issues have been forever foreclosed to the Petitioner as law of the case.

II

This Case Does Not Conflict With *Gertz v. Robert Welch, Inc.*, ___ U.S. ___, 94 S.Ct. 2997 (1974). *Gertz* Concerns Only The Liability For Defamation Of A "Private Individual." This Case Involves The Privilege Against Liability For Defamation Of A "Public Figure."

The Respondents submit that the present case is not affected by this Court's holding in *Gertz v. Robert Welch*, supra. This case involves the application of the constitutional privilege of free speech established by this Court in *Curtis Publishing Co. v. Butts, Associated Press v. Walker*, 388 U.S. 130, 87 S.Ct. 1975 (1967). In *Butts*, this Court expanded the privilege first enunciated by it in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964), to include speech that concerns "public figures" who have been ". . . involved in issues in which the public has a justified and important interest." *Curtis Publishing Co. v. Butts*, 388 U.S. at 134, 87 S.Ct. at 1980. This privilege can only be overcome by clear and convincing evidence that the tortfeasor acted with "actual malice," which this Court has defined as having knowledge of the falsity

of the speech or having acted with reckless disregard of its truth or falsity.

A plurality decision of this Court in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811 (1971), subsequently extended the *New York Times* privilege to preclude recovery by a *private individual* for defamation relating to his involvement in matters of general or public interest, absent a showing of actual malice. However, in *Gertz v. Robert Welch, Inc.*, supra, this Court receded from the holding in *Rosenbloom* and withdrew the privilege from situations involving private individuals. This Court's decision in *Gertz* was clear and precise, beginning with its statement of the issue for its consideration:

> "The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual *who is neither a public official nor a public figure* may claim a constitutional privilege against liability for the injury inflicted by those statements." Gertz v. Robert Welch, Inc., 94 S.Ct. at 3003.

and culminating in its holding:

> "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a *private individual*." *Id.* at 3010. (emphasis supplied).

At no point in *Gertz* did this Court alter the privilege against liability because of defamation of a *public figure*. It pointed out that the public figure, unlike the private individual, usually possessed access to the means of communication to rebut the defamation by use of self-help. The Court in *Gertz* provided ample guidance as to the appellation of "public figure:"

> ". . . For the most part those who attain this status [public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.
>
> ". . . [T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them." *Id.* at 3009-3010.

Examination of the present case reveals that the Florida courts have long held the Petitioner to be a "public figure" and that the alleged defamation concerned only his voluntary participation as a public figure in a public controversy.

In its earlier opinion of *Gibson v. Maloney*, 231 So.2d 823 (Fla. 1970), the Florida Supreme Court held that the Petitioner was indeed a "Public figure" and that the alleged defamation concerned his activities in that capacity:

> ". . . There can be little doubt that Maloney entered the area and established the anti-duPont editorial policy of his Apalachicola Times, for the purpose of arousing public indignation against these interests, *and by virtue of that made himself a public figure engaged in a public enterprise and for the purpose, among other things, of influencing public opinion.* He became part of the passing scene and therefore subject to fair comment." *Id.* at 824 (emphasis supplied).

At this point, compare with the guidance of *Gertz* the reasons for the Florida Supreme Court's holding that the Petitioner was in fact a "public figure." It found that the Petitioner had in his newspaper editorials created a public controversy over the economic impact of the duPont [Respondents] interests in the area. This clearly squares with the definition of *Gertz* that a public figure is one who has voluntarily thrust himself ". . . to the forefront of particular public controversies . . .," and there is no doubt that the comments of Respondent Gibson concerned only the activities of the Petitioner in his role as a public figure. The Florida Supreme Court declared that

> ". . . It was therefore fitting and proper that at such a public meeting [Rotary Club] the

> failure of a segment of the community to grow and the apparent reason for it not growing [the editorial activities of Petitioner] should be freely discussed. Therefore, under the command of the *Abrams*, *Jacova*, and *Sullivan* cases, the comment made by Gibson was 'fair comment' on a public matter relating in part to an individual who had by choice made himself newsworthy and part of the passing scene." Gibson v. Maloney, 231 So.2d 823 at 826 (Fla. 1970).

The Florida Supreme Court then remanded this case for retrial in which instructions under *New York Times* were to be given. However at the trial, the trial judge's instructions permitted the jury to consider whether or not the Petitioner was a "public figure," notwithstanding the Florida Supreme Court's clear determination of that issue of fact. The Respondents took appeal to the District Court of Appeal of Florida where they argued that the issue of whether the Petitioner was a "public figure" had been foreclosed from further consideration by the Florida Supreme Court:

> "Appellants contend that the Supreme Court's ruling on the 'public figure' question became the law of the case, and therefore it was error to permit that question to be decided by the jury on retrial. We agree. Under the instruction as given the jury was not required to find that plaintiff was a public figure. Indeed, as worded, the instruction enabled the jury to find that plaintiff was not a public figure, a

finding which if made would run counter to the holding of the Supreme Court.

"Insofar as the public figure question is concerned, the same facts were adduced on retrial as were before the Supreme Court when it made the decision that plaintiff was a 'public figure.' . . .

. . . .

"*Having concluded as we do, that the plaintiff is a public figure,* and that the jury should have been so instructed, the criticality of the trial court's failure to do so became apparent . . . *For this reason alone, the judgment reviewed herein must be reversed.*" Gibson v. Maloney, 263 So.2d 632 at 635 (Fla. 1972) (emphasis supplied)

Therefore, the basis of the Florida courts' result in this case was not, as the Petitioner has nevertheless asserted in his brief, *Rosenbloom v. Metromedia, Inc.*, supra; it was clearly predicated upon the finding that the Petitioner was a *public figure*, because of his editorial activities in his newspaper, The Apalachicola Times.

The Respondents feel compelled to point out to the Court that the issue of whether the Petitioner was in fact a "public figure," as the Supreme Court of Florida held in 1970, has been available for review by this Court on *two* occasions, in Case Number 69-1501 in

1970 and in Case Number 72-1065 in 1973. In both instances. this Court denied the Petitioner's petition for a writ of certiorari. Maloney v. Gibson, 398 U.S. 951 (1970); Maloney v. Gibson, 410 U.S. 984 (1973). It is. therfore, particularly inappropriate for the Petitioner to now attempt to again raise it as an issue for review.

Of perhaps unique significance is the fact that the alleged defamation in this case concerned the Petitioner's activities as owner and editor of the local newspaper. There are certainly few persons with greater ability to remedy by self-help their injury from defamation than an owner and editor of a newspaper — such as the Petitioner was. This Court pointed out in *Gertz* that public figures were usually persons who enjoyed free and ready access to the channels of communication and were able to thereby rebut false statements. This has been a constant factor in this Court's consideration of the "public figure" privilege. The Court will recall that in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975 (1967), it found great significance in the fact that the plaintiffs, both of whom were held to be "public figures," "... commanded sufficient public interest and had sufficient access to the means of counter-argument ..." to alleviate their injuries. *Id.* at 155, 87 S.Ct. at 1991. It can hardly be gainsaid that a man who owns and operates his own newspaper as did the Petitioner has any less access to the means of rebuttal than a college football coach such as Wally Butts.

III

This Case Does Not Conflict With *Cantrell v. Forest City Publishing Co.*, ___ U.S. ___ 95 S.Ct. 465 (1974). The State Courts In This Case Have Found No Proof Of "Actual Malice" Which The Petitioner, As A Public Figure, Must Prove In Order To Recover For Defamation. *Cantrell* Does Not Alter The Court's Definition Of "Actual Malice," Which Has Been Assiduously Applied By The State Courts In This Case.

The Petitioner has also claimed that the decisions in this case are in conflict with this Court's recent decision in *Cantrell v. Forest City Publishing Co.*, ___ U.S. ___, 95 S.Ct. 465 (1974).

The respondents' immediate and initial response is that *Cantrell* was decided by this Court on December 18, 1974. The Supreme Court of Florida denied the Petitioner's petition for writ of certiorari on November 13, 1974. There is certainly no directive in *Cantrell* that it is to be applied retrospectively.

However, *Cantrell* wrought no change in the law applicable to this case. *Cantrell* involves the "false-light" theory of the tort of invasion of privacy. This case has always involved the tort of defamation. The Petitioner has apparently cited *Cantrell* for authority upon the issue of "actual malice," proof of which would be necessary to overcome the public figure privilege against liability for defamation.

Quite simply in *Cantrell*, the trial judge had dismissed the plaintiffs' claim for punitive damages because there was no evidence that the invasion of privacy ". . . was done maliciously within the legal definition of that term." *Id.* at 469. He then went on to charge the jury that it could find liability for compensatory damages if it found that the publications had ". . . been made with knowledge of their falsity or in reckless disregard of the truth." *Id.* The appellate court felt that these actions created an anomaly: that the "malice" that the trial judge found lacking for punitive damages also had to result in an absence of "actual malice" required to overcome the constitutional privilege for awarding compensatory damages. Therefore, it held that the trial judge should have granted a directed verdict for the defendants.

However, this Court carefully explained that there is a distinction between "actual malice" in libel actions and common law malice required for award of punitive damages:

> ". . . As so defined, of course, 'actual malice' is a term of art, created to provide a convenient shorthand for the standard of liability that must be established before a State may constitutionally permit public officials to recover for libel in actions brought against publishers. As such, it is quite different from the common-law standard of 'malice' generally required under state tort law to support an award of punitive damages. In a false-light case, common-law malice — frequently ex-

> pressed in terms of either personal ill will toward the plaintiff or reckless or wanton disregard of the plaintiff's rights — would focus on the defendant's attitude toward the defendant's privacy, not towards the truth or falsity of the materials published." *Id.* at 470.

As a final result, this Court reconciled the actions of the trial judge. It held that although the trial judge found no evidence of *common-law malice* toward the plaintiffs to support a claim of punitive damages, the jury was not thereby automatically precluded from finding evidence of "knowing falsity or reckless disregard of the truth" so to award compensatory damages. This court in *Cantrell* did not in any way alter the privilege applicable to public figures in libel cases, nor did it diminish the definition of "actual malice" which must be proved to overcome that privilege.

In his petition, the Petitioner claims that because two juries in the past have awarded him punitive damages, this Court should infer that the juries also found actual malice. This contention runs afoul the very case cited by the Petitioner for conflict, *Cantrell v. Forest City Publishing Co.*, supra, in which this Court explained that the common law malice traditionally required for awarding punitive damages is not synonymous with "actual malice" required in libel cases under the *New York Times* doctrine. *See*, Cantrell v. Forest City Publishing Co., ___ U.S. ___, 95 S.Ct. 465 at 470 (1974).

The Petitioner in his petition at page eleven also alleges that two juries have found actual malice in this case. This allegation by the Petition is not correct. In the first trial, the trial court refused to give instructions reflecting the principles of *New York Times v. Sullivan*. *See*, Gibson v. Maloney, 231 So.2d 823 at 824 (Fla. 1970). In the trial which resulted in the second jury verdict, the trial judge failed to instruct the jury that the Petitioner was in fact a public figure as the Supreme Court of Florida had previously determined as law of the case. That jury was then able to find liability without any proof of actual malice. When the Respondents appealed the second jury verdict to the District Court of Appeal of Florida, that court made an independent review of the sufficiency of the evidence to support a finding of actual malice and held:

> "We cannot find based on our independent analysis of the record, that the proofs considered either singularily or cumulatively satisfy the constitutional standard with the convincing clarity necessary to support a judgment that the defamatory statements about which appellee complained were published with knowledge that they were false or with reckless disregard of whether they were false or not." Gibson v. Maloney, 263 So.2d 632 (1st D.C.A. Fla. 1972).

This independent review of the record conducted by the Florida court for sufficient proof of actual malice was in accordance with, and was indeed mandated by, this Court's succession of decisions in *New York*

Times v. Sullivan, supra; *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323 (1968); and *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811 (1971).

The Petitioner has also attempted in his petition to find significance in the statement by the District Court of Appeals in its 1972 decision that the allegedly defamatory statement by Respondent Gibson was ". . . erroneous, inaccurate and negligently made." Gibson v. Maloney, 263 So.2d 632 at 637 (1st D.C.A. Fla. 1972). However, the Petitioner has failed to realize that that court then immediately proceeded to point out that mere negligence will not suffice to meet the burden of proving "actual malice." That action was in strict adherence with this Court's guidance in *New York Times v. Sullivan*, 376 U.S. 290, 84 S.Ct. 710 (1964), when it stated

> "We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." *Id.* at 287-288, 84 S.Ct. at 730.

Again, the Respondents must point out that the issue of whether the Petitioner has proved the existence of "actual malice" was available for review at his most recent unsuccessful petition to this Court for a writ of certiorari in 1973 (Case Number 72-1065, 410 U.S. 984).

IV

The Petitioner Has Not Been Denied His Right To A Jury Trial Under The Seventh Amendment Of The Constitution Of The United States Because That Amendment Has Not Been Incorporated Into The Fourteenth Amendment To Apply To The State Courts.

Again the Petitioner has claimed that the decisions of the Florida courts have denied him his rights under the Seventh Amendment of the Constitution of the United States for a jury trial. The District Court of Appeal of Florida in its *1972* opinion directed the trial court to enter judgment in favor of the Respondents. That action came after three trials of this case, and again the Respondents must point out that this issue was raised in Petitioner's previous petition to this Court in 1973. Nonetheless, Respondents submit that Petitioner's claim under the Seventh Amendment has no bearing on this case because the Seventh Amendment's provision for jury trial has not been incorporated by the Fourteenth Amendment so to apply to state trials:

> "A denial of trial by jury in a state court is not a denial of due process of law under the Fourteenth Amendment. 'The Fourteenth Amendment neither implies that all trials must be by jury nor guarantees any particular form or method of state procedure.' Hardware Dealers' Mutual Insurance Company of Wisconsin v. Glidden Co., 284 U.S. 151, 52 S.Ct.

69, 71, 76 L.Ed. 214." Olesen v. Trust Co. of Chicago, 245 F.2d 522, 524 (7th Cir. 1957), cert. den. 255 U.S. 896, 78 S.Ct. 70 (1957).

The actions by the Florida courts in this case are exactly the same as the final action taken by this Court in *New York Times v. Sullivan*, supra. If a review of all of the evidence reveals absolutely no basis in fact to constitutionally support a judgment for a plaintiff, then considerations of "effective judicial administration" require that the courts direct the trial court to enter a judgment in favor of the defendants. *See*, New York Times v. Sullivan, 376 U.S. 254 at 284-285, 84 S.Ct. at 728 (1964).

CONCLUSION

The Court should decline on jurisdictional grounds to issue the Writ of Certiorari in this case. Prior decisions of this Court have been correctly interpreted and applied in this case, and the two cases cited by the Petitioner for conflict, *Gertz v. Robert Welch, Inc.*, ___ U.S. ___, 94 S.Ct. 2997 (1974), and *Cantrell v. Forest City Publishing Co.*, ___ U.S. ___, 95 S.Ct. 465 (1974), have no application to the facts presented by this case. Most significantly, the issue presented by Petitioner of whether he was in fact a "public figure" has been presented to this Court for review on two prior occasions. The Petitioner's other issue, whether the Respondents acted with "actual malice," was presented for this Court's review in the Petitioner's

1973 petition. The Respondents submit to this Court that these issues have already been resolved for all time.

Respectfully submitted

CHARLES S. ISLER, JR. of
ISLER, HIGBY, BROWN
& SMOAK
434 Magnolia Avenue
Post Office Box 1579
Panama City, Florida 32401

ATTORNEYS FOR
RESPONDENTS

CERTIFICATE OF SERVICE

I, CHARLES S. ISLER, JR., a member of the Bar of the Supreme Court of the United States, hereby certify that three true copies of the foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari were served on Petitioner by mailing copies thereof in duly addressed envelope to J. Ben Watkins of Watkins, Hill & Marts, Post Office Drawer 1814, Tallahassee, Florida 32302, Attorneys for Petitioner, this ____ day of March, 1975.

CHARLES S. ISLER, JR.